

PHAM (Migration) [2019] AATA 6298 (28 October 2019)

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DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mr HENRY PHAM

VISA APPLICANTS: Ms THI HANG LE
Miss THI THU HA LUONG
Master HUU SANG LUONG

CASE NUMBER: 1722152

DIBP REFERENCE(S): OSF2016/039204

MEMBER: Helena Claringbold

DATE: 28 October 2019

PLACE OF DECISION: Sydney

4.

DECISION: The Tribunal remits the application for a Partner (Provisional) (Class UF) visas, with the direction that the primary visa applicant meets the following criteria for a Subclass 309 (Spouse (Provisional)) visa:

 - Public Interest Criterion 4020 for the purposes of cl.309.225 of Schedule 2 to the Regulations; and
 - the secondary visa applicants meet the following criteria:
 - Public Interest Criterion 4020 for the purposes of cl.309.323 of Schedule 2 to the Regulations.

STATEMENT MADE ON 28 OCTOBER 2019 AT 7:33AM

CATCHWORDS

MIGRATION – refusal – Partner (Provisional) (Class UF) visa - subclass 309 – visa applicant breached Public Interest Criterion 4020 – visa applicant provided false and misleading information – genuine and continuing relationship – compassionate circumstances –decision under review remitted

LEGISLATION

Migration Act 1958, ss 5, 65, 359

Migration Regulations 1994, r 1.03, Schedule 2, cls 309.211, 309.225, 309.323

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

5. On 4 October 2016, Ms Thi Hang Le (the visa applicant) applied for a Partner (Provisional) (Class UF) visa. The application was based on her spousal relationship with Mr Henry Pham, the sponsor and review applicant. Miss Thi Thu Ha Luong and Master Huu Sang Luong, who are the visa applicant's children, are included in the application as secondary applicants.
6. On 16 August 2017, a delegate of the Minister for Immigration and Border Protection refused to grant the visa. The delegate was not satisfied that the visa applicant meets Public Interest Criterion (PIC) 4020. Therefore, the visa applicant and secondary applicants did not meet cl.309.225 of Schedule 2 to the Migration Regulations 1994 (the Regulations) made under the *Migration Act 1958* (the Act). On 18 September 2017, the sponsor provided the Tribunal with a copy of the delegate's decision record. This is a review of the delegate's decision.
7. On 21 October 2019, the sponsor appeared before the Tribunal to give evidence and present arguments. The Tribunal also received oral evidence from the visa applicant. The Tribunal hearing was conducted with the assistance of an interpreter in the Vietnamese and English languages. The review applicant was represented in relation to the review by his registered migration agent.
8. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The Tribunal has taken into consideration, individually and as a whole, all the evidence in the Department of Immigration and Border Protection's (the Department's) case file and the Tribunal's case file and the evidence at the Tribunal hearing.

10. ISSUE

11. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.309.225 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted

or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

12. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

13. **BACKGROUND ON THE EVIDENCE**

14. In 1978, the visa applicant was born in Ha Nam, Vietnam. Her parents and three siblings live in Vietnam. In 1999, she married Mr Huu Son Luong (Mr Luong). On 26 April 2011, Mr Luong and the visa applicant divorced. There are two children from this relationship who were born in 2001 and 2007, and they live with the visa applicant in Vietnam and have been included in the application as secondary applicants.
15. In 1973, the sponsor was born in Hai Duong, Vietnam. He is also known as Quang Hung Pham. His parents and one sibling live in Vietnam. On 30 March 2005, the sponsor was granted Australian citizenship. On 26 March 2000, he married Ms Thi Nuoi Tran. On 9 August 2009, Ms Tran and the sponsor divorced. There are no children from this relationship. In 2007, he commenced a relationship with Ms Tracee Luong also known as, Ms Thi Thu Thuy Luong (Ms Luong) and their relationship ended in 2009. There is one child from this relationship who was born in 2008 and the child lives with Ms Luong.
16. On 12 April 2013, the parties met in Hai Duong Province, Vietnam on a tour to Do Son. The parties remained in contact with each other until the sponsor returned to Australia on 1 May 2013. Thereafter, they communicated by telephone and on 7 March 2015, the sponsor proposed marriage to the applicant. On 22 October 2015, the sponsor returned to Vietnam on 22 October 2015 and the parties married on 4 November 2015 in Hai Duong Province, Vietnam. The sponsor returned to Australia on 7 November 2015.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in a material particular?

17. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
18. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
19. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

20.

21. The delegate's decision record (DDR), informed the Tribunal of the following information:

- On 4 October 2016, in their written statements, the visa applicant and the sponsor, stated that they first met on 12 April 2013, on a group tour to Do Son.
- On 13 June 2017, at a Departmental interview the visa applicant stated that, she had not met or known about the sponsor or his family prior to them meeting on 12 April 2013. When asked whether, she had met or spoken with the sponsor's ex-wife or ex-partner, she stated she had not met his ex-partner, Ms Tracee Luong.
- On 13 June 2017, a Departmental officer told the visa applicant that, Department records show that, the sponsor's ex-partner, Ms Tracee Luong, is the sister of the visa applicant's ex-husband and Ms Luong sponsored the visa applicant's ex-husband to Australia on a number of occasions. The visa applicant responded and stated that she did not think that this (these circumstances) affected her relationship (with the sponsor). When asked why she had not disclosed this information and why she had stated earlier that, she had not met the sponsor's ex-partner Ms Luong, the visa applicant did not respond.
- In July 2017, the visa applicant responded to the Department's invitation to comment on the information. She stated the following:
 - In 1999 she married Mr Luong, her ex-husband. In 1996, his sister, Ms Luong travelled to Australia to study and subsequently settled in Australia. Ms Luong returned to Vietnam several times during the time the visa applicant was married to and lived with her ex-husband, but she didn't know about her personal life very well. The last time she met Ms Luong was in 2009 when she travelled to Vietnam with her children. However she also stated that she didn't meet Ms Luong during this trip.
 - In 2008, the visa applicant separated from her ex-husband, Mr Luong and she rarely contacted his family (according to the visa applicant's Vietnamese statement).
 - The visa applicant was aware that Mr Luong, her ex-husband travelled to Australia sometime between 2009 and 2010.
 - In 2011, the visa applicant and Mr Luong divorced. Mr Luong received custody of the visa applicant's two children, however, they only stayed with him for a few months and then returned to live with the visa applicant.
 - On 12 April 2013, the visa applicant first met the sponsor and his ex-de facto partner's children on a trip to Don Son. However, she didn't know about the connection between the two families as she didn't recognise the children as being of the sponsor's former de facto relationship.
 - The visa applicant knew about the sponsor's relationship with Ms Luong at a later stage, when the sponsor told her about his previous relationships.
 - The visa applicant didn't declare her relationship with Ms Luong in the visa application or at the interview because she was worried that the complicated relationship would have a negative impact on her visa application.

22. The delegate was also not satisfied that the visa applicant had separated from her ex-husband in 2008 as she claimed. This is recorded in the DDR.

23.

24. The sponsor and the visa applicant told the Tribunal the following: during the interview with the Department the visa applicant became confused about the English version of Ms Thi Thu Thuy Luong's name, being Ms Tracee Luong and stated that she didn't know of her. In her post Departmental interview the visa applicant stated that she didn't declare her relationship with Ms Luong in the visa application or at the interview because she was worried that the complicated relationship would have a negative impact on her visa application and that this was made at the direction of her solicitor. The sponsor's migration agent claimed that the statement the visa applicant made about not declaring her relationship was naïve.
25. The Tribunal considered the evidence individually and as a whole. It does not accept that the visa applicant didn't meet or know Ms Luong as she originally claimed. The Tribunal accepts the other evidence provided by the visa applicant as follows: she was married to her ex-husband from 1999 to 2008. While she was married to Mr Luong, she met his sister, Ms Luong several times. She knew that Ms Luong sponsored Mr Luong for visas to Australia. The Tribunal finds that the visa applicant didn't declare her relationship with Ms Luong because she was worried it would have a negative impact on her visa application and to more than likely reflect the true circumstances. The Tribunal considers that the visa applicant could not have been under any misunderstanding about the claims she made with regard to Ms Luong and does not accept that her statement was made out of naivety. The Tribunal finds that the visa applicant intentionally withheld the information about her relationship with Ms Luong because she was concerned that Ms Luong being the sponsor's ex-partner and her ex-husband's sister might reflect on the visa application. The Tribunal finds that in not declaring information about her relationship with Ms Luong and withholding that information, the visa applicant provided false and misleading information in a material particular, at the time it was given. The Tribunal is of the view that the withholding of the information about her relationship with Ms Luong was to assist the visa application and may have been relevant to meet cl.309.211(2) of Schedule 2 to the Regulations.
26. Consequently, the Tribunal is not satisfied that there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made.
27. Therefore, the visa applicant does not meet PIC 4020(1).

Should the requirements of PIC 4020(1) or (2) be waived?

28. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.
29. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015 v MIBP* [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
30. There is no evidence before the Tribunal that there are compelling circumstances that affect the interests of Australia.

31. **Are there compassionate or compelling circumstances?**

32. The sponsor provided information to support the parties' relationship and information seeking a waiver of PIC 4020 as follows.
33. A record of his application for temporary household registration at the visa applicants address; a record issued by the Socialist Republic of Vietnam dated 6 August 2019 for day-to-day temporary residence for the sponsor between 6 August 2019 and 5 May 2020; ad hoc money transfers from the sponsor to the visa applicant; copies of air tickets in the parties' names; third party statements attesting to the genuine nature of the parties' relationship; third party statements attesting to living arrangements for the visa applicant in 2007; photographs depicting the parties together and with others at different locations. The Tribunal accepts at face value that the parties are in a married relationship.
34. The sponsor told the Tribunal the following: his previous relationships have been difficult. The parties have been in their relationship for six years and have been in a married relationship for four years. He has visited the visa applicant and her children on seven occasions. Should the visa applicant not be able to come to Australia, he will live with her in Vietnam. However, he is an Australian citizen and wants his wife and her children to come to Australia to form a family together. He is lonely and needs his wife to be with him. He loves his wife and wants to care for her. The visa applicant loves him and cares for him.
35. This decision record is a synopsis of the information before the Tribunal. The Tribunal considered the evidence that the parties committed to each other more than four years ago. They have been in a spousal relationship for almost four years. Ultimately, the parties appear to be committed to a shared life to the exclusion of all others and the parties want to live and raise a family in Australia. The Tribunal is satisfied that these are compassionate circumstances that affect the interests of an Australian citizen, that justify the granting of the visas.

DECISION

36. The Tribunal remits the application for a Partner (Provisional) (Class UF) visas, with the direction that the primary visa applicant meets the following criteria for a Subclass 309 (Spouse (Provisional)) visa:
- Public Interest Criterion 4020 for the purposes of cl.309.225 of Schedule 2 to the Regulations; and
 - the secondary visa applicants meet the following criteria:
 - Public Interest Criterion 4020 for the purposes of cl.309.323 of Schedule 2 to the Regulations.

Helena Claringbold
Member

37.

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is *false or misleading in a material particular* means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...